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OCTOBER TERM, 1900.

Filed Feb. 4, 1901.

C. RASMUSSEN, PLAINTIFF IN ERROR,

vs.

THE STATE OF IDAHO.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

NO. 215.

R. RASMUSSEN, PLAINTIFF IN ERROR,

VS.

THE STATE OF IDAHO.

In Error to the Supreme Court of the State of Idaho.

STATEMENT OF FACTS.

The defendant was convicted in the District Court of Oneida County, Idaho, of driving sheep from Box Elder County, Utah, into the State of Idaho on the 12th day of April, 1899. The information alleges that this act was contrary to the proclamation of the Governor. The last legislature passed an act providing:

Session Laws, 1899, page 452, Section 1:

> "Whenever the Governor of the State of Idaho has reason to believe that scab or any other infectious disease of sheep has become epidemic in certain localities in any other State or Territory or that conditions exist that render sheep likely to convey disease, he must thereupon by proclamation, designate such localities and prohibit

the importation from them of any sheep into the State, except under such restrictions as, after consultation with the State Sheep Inspector, he may deem proper."

In pursuance of this authority it is claimed that on the 12th day of April, 1899, the Governor issued a proclamation as follows:

PROCLAMATION.

Scheduling certain Localities on account of Scab or Scabbies.

STATE OF IDAHO,
Executive Office.

Whereas, I have received statements from reliable wool-growers and stock-raisers of the State of Idaho, said statements being supplemented by affidavits of reputable persons, all to the effect that the disease known as scab or scabbies is epidemic among sheep in certain localities or districts, viz: in the County of Cache, State of Utah; the County of Box Elder, in the State of Utah; and the County of Elko, in the State of Nevada; and

Whereas, it is known that sheep from said districts are annually moved, driven or imported into the State of Idaho, and if so moved would thereby spread infection and disease on the ranges and among the sheep of this State, which act would result in great disaster.

Now, therefore, I, Frank Steunenberg, Governor of the State of Idaho, by virtue of authority in me vested, and after due consultation with the State Sheep Inspector, do hereby prohibit the importation, driving or moving into the State of Idaho of all sheep now being held, herded or ranged within said infected districts, viz: the County of Cache, in the State of Utah; the County of Box Elder, in the State of Utah; and the County of Elko, in the State of Nevada, or which may hereafter be held, herded or ranged

within said infected district, for a period of sixty days from and after date of this proclamation; after the termination of said sixty days sheep can be moved into this State only upon compliance with the laws of the State of Idaho regarding the inspection and dipping of sheep.

In witness whereof, I have hereunto set my hand and caused to be affixed the Great Seal of the State. Done at Boise, the Capital, this 12th day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

(Seal.) FRANK STEUNENBERG.

By the Governor.

M. PATRIE,

Secretary of State.

This defendant was called as a witness and testified to the facts and he swore that he drove sheep from the southern part of Utah into and through the county of Box Elder, in Utah, and into the county of Cassia, Idaho, and from thence into the county of Oneida where he was arrested. The defendant offered to show that the sheep that he had thus driven were perfectly healthy and had no need of any quarantine.

A question was asked defendant if his sheep had the scab or scabbies, which was objected to and the objection was sustained (Record p. 10) and then counsel for defendant offered to show that the sheep did not have any indication or hint of any disease whatever at the time they were brought into the State of Idaho. On this state of facts the defendant contends:

1st. That the act of the legislature, taken together with the proclamation of the Governor, as part of it is unconstitutional and contrary to that clause of the Constitution of the United States, Section 8, Article 1, which authorizes Congress to regulate commerce between the states.

2nd. That the legislation and proclamation of the Governor is contrary to the clause of the Constitution which prevents the states from legislating against property of citizens of other states. Section 2, Article 4.

The assignments of error are made specific to particular rulings of the trial court and of the Supreme Court, but they all relate to the contention above stated:

ASSIGNMENTS OF ERROR.

1. That the Supreme Court of the State of Idaho erred in sustaining the validity of the act of the legislature of the State of Idaho, Session Laws 1899, page 452, as fully set forth in the records and briefs in this cause.

2. The Supreme Court of the State of Idaho erred in sustaining the validity and power of the proclamation of the Governor excluding certain sheep from the State of Idaho on the ground of scabbies.

3. The Supreme Court of the State of Idaho erred in holding that the act of the legislature of the State of Idaho, Session Laws 1899, page 452, and the proclamation of the Governor thereunder was not in violation of Section 8, Article 1, of the Constitution of the United States.

4. The Supreme Court of the States of Idaho erred in holding that the act of the legislature, session laws 1899, page, 452, and the proclamation thereunder was not in viotion of Section 2, Article 4, of the Constitution of the United States.

5. The Supreme Court of Idaho erred in sustaining the trial court in each of the following particulars in which the trial court erred, and the plaintiff in error herein assigns as error each of the following assignments made in the Supreme Court of the State of Idaho to the ruling of the trial court.

The court erred:

1st. In denying the motion to quash.

2nd. In overruling the demurrer.

3rd. In admitting in evidence the document called "Proclamation of the Governor," and overruling the objection of counsel for the defendant thereto.

4th. In sustaining the objection of counsel for the prosecution to question to defendant: "Did your sheep have scab or scabbies?"

5th. In sustaining objection to question to defendant: "Did they (the sheep) have any indication of any disease?"

6th. In sustaining objection to question to defendant: "Did you know of this proclamation that has been offered in evidence at the time you drove into Oneida County?"

7th. In sustaining objection to question to defendant: "Had you ever heard or been informed anything about it (the proclamation)?

8th. In overruling defendant's motion for nonsuit.

9th. In overruling a direction to the jury to find for defendant upon the reasons named in the motion for nonsuit.

10th. In refusing to charge as request No. 1.

11th. In charging the jury in paragraph No. 1. viz.: reading the so-called statutes of Idaho as the law in the case.

12th. In charging the jury that if defendant drove into Oneida County bands of sheep, being driven from the prohibited section embodied in the governor's proclamation, then the defendant is guilty. (Paragraph 2.)

13th. In charging that the governor had the right to issue the proclamation read in evidence. (Paragraph 3.)

14th. In charging that if defendant violated the proclamation he also violated the provisions of law. (Paragraph 4.)

BRIEF.

The plaintiff in error claims that this court has already determined the principles which govern this case in the two cases of Railway Company against Husen, 95 U. S. 465, and Missouri, Kansas & Texas Railway vs. Haber, 169 U. S. 613. The question of the method of dealing with diseased cattle and sheep and of dealing with cattle and sheep in transportation to prevent disease has been a much vexed one. We have nothing to add to the discussion which has already been so fully had in the cases above quoted. A distinction might be drawn between Texas Fever in cattle and scabbies in sheep in this: All sheep in all parts of this country are liable to scabbies; it is a prevalent disease, or rather than a disease a difficulty in raising sheep. There are healthy sheep yet it seems as if the scab was almost a necessary incident in their handling. It has never been eradicated and perhaps never can be. The Texas Fever is local in its character and confined to a small part of the country and more easily stamped out. The general principles of law applicable to them however are the same. Healthy sheep and healthy cattle, whether they come from Texas or Utah have a right to be shipped all over this United States. No state can prevent by any kind of legislation, direct or indirect, the commerce between the states in healthy stock. No state can be proscribed so that its stock shall not have all the benefits of all other states.

In Railway Company against Husen, *supra*, the law was declared unconstitutional because of the very defect which we here claim, viz: that there was no distinction between healthy and unhealthy stock, all were alike to be excluded for a period long enough to prevent the disease from being introduced into the state. No case holds and

no principle permits exclusion of healthy sheep. The sheep in this case were proven or attempted to be proven healthy and had not any sign or sympton of disease. The sin of these sheep in our case was that they had been driven from Utah and that it was the spring of the year.

Reliance was made upon the second case quoted, Railway Company against Haber, but that statute was sustained solely on the ground that it was a rule of evidence. It was competent to provide that the burden of proof should be changed; that a *prima facie* case of disease was made from the fact that the cattle came from diseased country, but the owner was permitted to rebut the presumption to show that they were healthy; the very thing which we offered to show and which is excluded by the Idaho statute and proclamation. The following quotation from the last named case containing also a part of Railway Company vs. Husen we submit as sufficient argument to cover the entire ground.

> "Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, you shall not bring into the State any Texas cattle or any Mexican cattle, or Indian cattle between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities. Such a statute, we do not doubt, is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."

"The decision in that case was placed distinctly on the ground that although the State could prevent persons and animals suffering under contagious or infection diseases, or convicts, etc., from entering the State, it could not under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce, and the Missouri statute was held to be unconstitutional because it went beyond the necessities of the case, having been so drawn as to exclude all Texas, Mexican or Indian cattle from the State, (except cattle to be transported across and out of the State,) whether free from disease or not, or whether they would or would not do injury to the inhabitants of the State.

"No such criticism can be made of the statute of Kansas. It does not prohibit the bringing into the State of *all* Texas cattle. It does not in any true sense prohibit or burden any commerce among the States specifically authorized by Congress; but, for purpose of self-protection only and in the exercise of its inherent power to protect the property of its people declared that any corporation or person bringing into the State or driving into or through any county of the State cattle liable to impart or capable of communicating Texas, splenic or Spanish fever to domestic cattle should be responsible in damages to anyone to whose cattle that disease was communicated by the cattle so brought into the State."

In the Kansas Statute reported there it will be seen that there is no attempt of excluding all classes of cattle or of excluding any healthy cattle at all, only a method of determining whether cattle were healthy or unhealthy. A distinction between the Kansas statute and the Idaho statute, with the Governor's proclamation added as a combination, is made prominent by the offer of defendant to show that the sheep were free from disease. The Kan-

sas statute provided a rule of evidence that if the defendant had offered to show under that rule of evidence that the cattle were healthy they were to be received into the State of Kansas. Healthy cattle could not be excluded from Kansas, healthy sheep cannot be excluded from Idaho.

The same reasoning is found in the case of Henderson vs. Mayor, 92 U. S. 259.

There are two cases in the State of Idaho which bear directly upon this question and upon another statute not so objectional as this which was held unconstitutional. We refer to the case of State of Idaho vs. Duckworth, 51 Pac. 456 and Territory against Evans, 2 Idaho, 634.

A few words might be said about the obvious intent of this statute and the bad faith in which this proclamation was issued. It is not a statute of quarantine in any sense. There is no inspection of sheep required or made. It does not attempt to place the sheep in any position where they can be held for a period of time before they enter into the State, it is simply an embargo for a period of sixty days. If the counties of Utah were infected with scab no reason is given why they should be admitted any time in the year any more than during the sixty days mentioned in the proclamation. There are some surroundings connected with this case of which the courts below would take judicial notice and of course this court takes the same notice of it. Sheep are ranged in Idaho and Utah on the public domain. The western part of Utah is a large desert where no stock of any kind remain in the summer because there is no water there, but various shrubs grow there which can be eaten by sheep when snow is on the ground. The only uses to which it can be at present put is that of grazing sheep upon it in winter. These sheep must be taken in

the summer to the mountains where there is water and shade; hence every spring sheep are being driven from these deserts of western Utah to the mountains in the eastern part of Utah and north to the mountains of Idaho. Their owners have a right to utilize the grasses upon the public domain; the State of Idaho cannot directly or indirectly, exclude sheep of citizens of other states from grazing upon the lands of the United States in the State of Idaho. It is apparent when we consider the situation what the purpose of this proclamation is. While it does in no manner attempt to cure the scab or prevent scab or quarantine against scab the whole scheme is to prevent Utah sheep from grazing on the mountains of Idaho.

Reliance was had in the argument of the Supreme Court of Idaho upon certain opinions of certain writers for the Agricultural Department of the United States. All these opinions are but theories. Different pamphlets are found contradicting each other. The Supreme Court of Idaho overruled the decision of this court in the case of Railway Co. against Husen upon the supposition that some writer in the Agricultural Department had determined that the decision of the Supreme of the United States should be overturned by his edict. It makes no difference whether it takes six or sixty days to secure scab or a year and sixty days; healthy sheep have a right to be driven from one state to the other and to graze upon the public domain wherever it exists. The courts will not permit any regulation ostensibly or under the guise of providing for the health of stock or men to prevent or hamper the introduction of property into other states. These fictitious pretenses creating difficulties cannot make this law constitutional. It is an attempt to interfere with interstate commerce.

In Re Rebman, 41 Fed. 868.
Brimer vs. Rebman, 138 U. S. 78.
Voight vs. Wright, 141 U. S. 62.
Minnesota vs. Barber, 136 U. S. 313.
Chy. Lung vs. Freeman, 92 U. S. 275.

Even the introduction of intoxicating liquor in its original packages cannot be regulated by state legislation unless authorized by the Statutes of the United States.

Leisy vs. Hardin, 135 U. S. 100.
1 Supp. Rev. Stat. of the U. S., page 779.
Vance vs. Vandercook, 170 U. S. 444-445.

There is no proof in this case or finding in the proclamation or statement in the pamphlet from the Agricultural Department that the disease of scab is any worse or different in the spring of the year than at any other season. Two months in the spring sheep are prohibited from entering Idaho. Why not the next two months and the rest of the year? If the Governor can prohibit for two months he can prohibit for ever; if in the spring of 1899 in each occurring spring. As a matter of illustration since this suit has been in court, in the spring of 1900, a similar proclamation was issued for two months in the spring of the year; it is to be annual, ever occurring whenever the grass is green.

All the cases and principles discussed are cases applicable to a sudden epidemic that exists only for the time being and does not exist in the locality quarantined. But this disease of Scabbies exists just as much in Idaho as anywhere else, it exists one year just as much as another. There is no particular limit to it either in time, place or circumstances.

In the brief of counsel for the State in the Supreme Court of Idaho reliance was had upon certain decisions

which we will notice here. The first was upon a Michigan statute quoted in Hurst vs. Warner, 60 N. W. 440; 102; Mich. 238; Minneapolis, St. P. & S. S. M. Ry. vs. Milner, 57 Fed. 276; one a decision of the Supreme Court of Michigan and the other a decision of Judge Severens. In that case they did not attempt to prevent immigrants and passengers although coming from a region afflicted with the small pox from entering the State of Michigan, but only required they be delayed long enough for their baggage to be disinfected. The statute was sustained in both decisions, but in the State court the action of the Governor and Board of Health was held not warranted by the statute itself, but in both decisions the opinion is placed upon the ground distinctly that it is only temporary detention for the purpose of preventing disease and curing it. Compare it with the proclamation here.

There is no attempt in this proclamation or in this statute to cure the disease of scab, no attempt to disinfect the sheep, no attempt at inspection of possibility of inspection or disinfection, but simply a wholesale prohibitation exactly contrary to what was done in Michigan case.

Counsel also quoted the case of St. Louis S. W. Ry. Co. vs. Smith, 49 S. W. 627. That was a case where a disease had broken out among cattle in Louisiana known as Charbon or Anthrax, a sort of splenetic fever very contagious, infectious and virulent and the Board of Health under the statute of Texas excluded cattle of that character from June to November on the presumption that all Louisiana cattle had the disease. We think the decision is erroneous, but it can be distinguished very readily from this from the fact that there was no offer in that case to show that those cattle were healthy as there was in our case that thesheep were healthy. The court said as the basis of its decision:

> "So far as the record shows, every animal of the kind prohibited in the State of Louisiana may have been actually affected with Charbon or Anthrax."

Exactly the contrary of what we offered to show in our case.

Counsel cited also Compagnie Francaise de Navigation vs. State Board of Health, 25 So., 591. This was a suit for damage against the State Board brought by the owners of a ship for not being allowed to land its passengers who were immigrants from Italy to New Orleans. The Board of Health of the State of Louisiana excluded them for the time being by placing the vessel in quarantine and refused to permit them to land on the ground of an alleged epidemic existing in Italy. It will be seen that the action of the Board of Health was not against all Italians or against any immigrant for a specified time, but was temporary and applied only to that particular ship for the reasons which appeared to them that the immigrants on that ship were affected with disease. The case goes to the extreme limit, but certainly is distinguishable from the one we have in hand.

The case of Train vs. Boston Disinfecting Co., 144 Mass. 523, was a case relied upon by counsel for Idaho. That was a case where the State of Massachusetts provided that all rags brought into that state should be disinfected by some process provided for. It was claimed that that statute was illegal. The statute was exactly opposite of the Idaho statute. We do not object to a statute disinfecting sheep, we object to a statute prohibiting their entry.

Counsel also relied upon the case of Kimmish vs. Ball, 129 U. S. 217 and the following quotation was used in his brief:

> "Such a statute the court held was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce and was therefore invalid. At the same time the court admitted unhesitatingly that a state may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it. No attempt was made to show that all Texas, Mexican or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected, that it would have been impossible to separate the healthy from the diseased. Had such proof been given a different question would have been presented for the consideration of the court. Certainly all animals thus infected may be excluded from the State by its laws until they are cured of the disease, or at least until some mode of transporting them without danger of spreading is devised."

Precisely, the state may prevent animals "*suffering from a contagious or infectious disease*" from coming within it. That was not this case, because our sheep had no infectious or contagious disease and as further said *no attempt was made in this case to show that all sheep coming from Utah during the months mentioned were infected with a disease or that the sheep were so generally infected that it would have been impossible to have separated the healthy from the diseased.* It would indeed have been a different question had it been presented. We offered to show exactly the contrary of it.

The statute itself delegates the power to the Governor. It does not in terms exclude sheep for any sixty days, but it authorizes the Governor to legislate upon that subject. In the Supreme Court of Idaho we contended that that was unauthorized delegation and was void for that reason. There our contention was this:

"The particular act of determining conditions is not an executive act. It is necessarily legislative. It is for the legislature and not for the executive or judiciary to say what shall be quarantined and on what terms and in what way, these sheep shall be admitted or handled when they are admitted. The detail must be established by the legislature and not by the executive. This is a power that the legislature cannot delegate to the Governor.

Sutherland on Statutory Construction, Par. 68. p. 69.

Slinger vs. Henneman, 38 Wis. 504-508, 510.

Sutherland on Statutory Construction, Par. 69, p. 71.

State vs. Field, 17 Mo. 529.

Cooley Constitutional Limitation, (First Ed.) pp. 116-117 and note.

Cooley Constitutional Limitation, (Sixth Ed.) p 137.

The Governor, however, far exceeded the power given him. The act only authorizes him to prevent, except under restrictions, the importation of sheep. It nowhere authorizes him to prohibit entirely all sheep It only gave him the power to create certain quarantine rules, which he might do under the name of restrictions. He could provide that they could be imported only by inspection, if it was a reasonable and proper inspection, or other similar restrictions, but he has gone further and not only prohibited under restriction, but prohibited in toto."

We now add that is a question for the Supreme Court of Idaho and perhaps cannot be reviewed here. If not it is because the decision of the Supreme Court of Idaho is conclusive on that subject and the proclamation becomes a part of the legislation of the State of Idaho. It cannot

then be said that this proclamation is not subject to the same right to review in this court to the extent as if it was an act of the legislature. The effect of the legislation and proclamation must be taken together and if the entire combination operates as an interference with the right of Congress to legislate upon that matter under the two clauses of the Constitution it is illegal and must be set aside.

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